FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 27, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2008-726
v.	:	A.C. No. 41-03660-153277
LUMINANT MINING COMPANY, LLC	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 2, 2008, the Commission received from Luminant Mining Company, LLC ("Luminant") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On June 11, 2008, the Department of Labor's Mine Safety and Health Administration issued Proposed Penalty Assessment No. 000153277 to Luminant, proposing a civil penalty for Citation No. 4542218. In its request, Luminant states that it intended to timely contest the proposed penalty but that it failed to do so due to "inadvertence and mistake by Company personnel."

The Secretary opposes Luminant's request to reopen. She states that the conclusory assertion of the cause for Luminant's failure to timely file does not constitute a showing of the circumstances required to obtain reopening under Fed. R. Civ. P. 60(b). She requests that the Commission deny the operator's request to reopen.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Luminant's motion to reopen and the Secretary's response, we agree with the Secretary that Luminant has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Luminant's conclusory statement that its failure to timely file was due to "inadvertence and mistake" does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Luminant's request. *See, e.g., Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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